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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fifth session (20-24 November 2017)

Opinion No. 85/2017 concerning Franck Kanyambo Rusagara, Tom Byabagamba and François Kabayiza (Rwanda)

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/36/38), on 11 September 2017 the Working Group transmitted to the Government of Rwanda a communication concerning Franck Kanyambo Rusagara, Tom Byabagamba and François Kabayiza. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation,

disability, or any other status that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. The present case concerns three persons: Franck Kanyambo Rusagara, Tom Byabagamba and François Kabayiza. All three persons are nationals of Rwanda. They are connected by family and professional relationships.

5. According to the source, Mr. Kanyambo Rusagara had a distinguished career within the Rwandan armed forces until his retirement in 2013. He was a member of the Rwandan Patriotic Front during the conflict that ended the Rwandan Genocide in July 1994. He subsequently served as Chief Justice of Kanombe Military High Court and Secretary-General of the Ministry of Defence, among other positions. Mr. Kanyambo Rusagara also served as Defence Attaché at the Rwandan Embassy in the United Kingdom until October 2013, when he was called back to Rwanda and forced to retire along with 78 other military officers. The source highlights that no reason was given for this forced retirement.

6. Mr. Byabagamba is the brother-in-law of Mr. Kanyambo Rusagara. According to the source, he is also a decorated military officer of the Rwandan armed forces, and was previously closely associated with President Kagame. From 1990 to 2010, Mr. Byabagamba worked in the personal protection detail of President Kagame. In 2003, he became head of the Republican Guard, personally responsible for the President's security.

7. The source reports that Mr. Kabayiza is also a former member of the Rwandan armed forces. A retired sergeant, Mr. Kabayiza worked most recently as Mr. Kanyambo Rusagara's driver.

Background

8. According to the source, the spectre of the 1994 genocide still dominates political and public life in Rwanda. Since Paul Kagame was first elected President in 2003, the Government has made social and economic progress but has failed to guarantee civil liberties for the Rwandan people, routinely silencing opposition in the media, politics and civil society. The source recounts that, in prosecuting dissidents and political opponents, the Government of Rwanda routinely introduces unlikely criminal charges against dissenters and uses excessively vague laws to impose unjustified restrictions on freedom of expression. Observers of the Administration have recognized manoeuvres used by President Kagame to target potential opponents both inside and outside the Government. Within the Government, President Kagame has used public criticism and formal charges to demonstrate his authority. Outside the Government, President Kagame has targeted both political opponents and former members of his Administration. In targeting voices of dissent, the Kagame Administration exercises significant control over the country's judiciary, in addition to pressuring potential witnesses to testify in accordance with the Government's interests.

9. The source notes that Mr. Byabagamba's brother (and Mr. Kanyambo Rusagara's brother-in-law), David Himbara, is a former economic adviser to President Kagame who fled the country after witnessing President Kagame's leadership style and the physical abuse he used against close allies and political dissidents. This conduct led Mr. Himbara to flee Rwanda in 2010, first to South Africa and later to Canada, where he currently resides.

10. According to the source, just after Mr. Himbara's departure, President Kagame ordered Mr. Byabagamba to bring his brother back to Rwanda. Mr. Byabagamba refused to intervene and was therefore removed from his position as Commander of the Republican Guard. After Mr. Himbara fled Rwanda, Messrs. Byabagamba and Kanyambo Rusagara maintained contact with their brother and brother-in-law despite pressure from colleagues to dissociate themselves.

Arrest and detention

11. According to the source, on 13 August 2014 Mr. Kanyambo Rusagara was summoned to the office of the General of the division, who was known to be a trusted ally of President Kagame. Four days after this confrontation, that is, on 17 August 2014, Mr. Kanyambo Rusagara was arrested at his home, despite no warrant being presented, then taken directly to Kanombe Military Police Barracks and locked in a small room for six days. Only at the end of these six days was an arrest warrant written before Mr. Kanyambo Rusagara in the same room in which he was being detained. His house was searched the day after his arrest, despite no warrant being shown.

12. According to the source, Mr. Byabagamba was arrested at his home on 23 August 2014, despite no warrant being presented and no grounds for arrest being given. After the arrest of Mr. Kanyambo Rusagara, it became apparent that Mr. Byabagamba would also be arrested. At the time of Mr. Byabagamba's arrest, a military spokesperson told a reporter that Mr. Byabagamba had been arrested as part of investigations into Mr. Kanyambo Rusagara and another military officer accused of the same offences. After Mr. Byabagamba's arrest, military officers went to search his home even though they had no warrant authorizing such action. Mr. Byabagamba's computer equipment and personal firearm were taken.

13. The source recounts that Mr. Kabayiza was arrested on 24 August 2014 on charges of illegal possession of a firearm and concealing evidence.

14. The source reports that Messrs. Kanyambo Rusagara, Byabagamba and Kabayiza were detained in Kanombe Military Police Barracks where they remain to this day. At Kanombe, Messrs. Kanyambo Rusagara and Byabagamba have both been held in solitary confinement under constant surveillance. Mr. Byabagamba first met his lawyers on 26 August 2014, but the meeting was held in the presence of the prosecutor.

15. Around March 2015, the court denied bail for all three defendants, arguing, without providing any supporting evidence, that they would not show up for their trial if they were allowed to leave prison. The source reports that the judge presiding over the bail hearing in fact later appeared as a witness for the prosecution in the trial.

16. According to the source, Messrs. Kanyambo Rusagara, Byabagamba and Kabayiza were tried jointly before Kanombe Military High Court. The trial began on 27 January 2015 but had to be delayed for nearly a year, until 5 January 2016, because Mr. Kabayiza's state of health prevented him from standing trial. Mr. Kabayiza stated in court, as Mr. Kanyambo Rusagara has confirmed and many other sources agree, that he was tortured while in detention in order to force him into testifying against Messrs. Kanyambo Rusagara and Byabagamba.

17. According to the source, Messrs. Kanyambo Rusagara and Byabagamba were imprisoned for having made comments deemed to be critical of the Kagame Administration. The comments attributed to Messrs. Kanyambo Rusagara and Byabagamba were made in the course of conversations held at the Nyarutarama Tennis Club, at Car Wash, a bar, and while they were eating in the Officers' Mess. The source reports that Mr. Byabagamba was also charged with "contempt of the national flag" for allegedly having failed to salute the flag during a ceremony in South Sudan. Mr. Byabagamba was also accused of "knowingly withholding evidence that would have facilitated the prosecution of a crime" for failing to immediately turn in Mr. Kanyambo Rusagara's pistols — gifts he had received during military service overseas — which Mr. Byabagamba had received from Mr. Kabayiza.

18. According to the source, the trial of Messrs. Byabagamba, Kanyambo Rusagara and Kabayiza was plagued with procedural errors. For example, Mr. Kanyambo Rusagara was convicted by the military court for events dating back to 2014, even though he was a civilian. One of the prosecution witnesses stated after the trial that he was forced to testify against Messrs. Kanyambo Rusagara, Byabagamba and Kabayiza. Furthermore, Messrs. Kanyambo Rusagara, Byabagamba and Kabayiza were not allowed to cross-examine all the witnesses that testified against them. The seven witnesses that they were not allowed to

cross-examine included a colonel who had served as judge in the pretrial detention phase and later testified on behalf of the prosecution.

19. The source reports that, on 31 March 2016, the court found Messrs. Kanyambo Rusagara and Byabagamba guilty of all charges against them. Mr. Kabayiza was found not guilty of illegal possession of firearms but guilty of knowingly concealing evidence. Mr. Kanyambo Rusagara was sentenced to 20 years' imprisonment. Mr. Byabagamba was sentenced to 21 years' imprisonment and stripped of his military office. Mr. Kabayiza was sentenced to five years' imprisonment and a fine of 500,000 Rwandan francs. After the sentences were read out, the men were driven directly back to the military prison.

20. According to the source, Messrs. Kanyambo Rusagara, Byabagamba and Kabayiza appealed the ruling shortly thereafter. However, no date has yet been set for the appeal. For the entirety of their detention at Kanombe Military Police Barracks, Messrs. Kanyambo Rusagara and Byabagamba have been held full-time in solitary confinement. Accordingly, Messrs. Kanyambo Rusagara and Byabagamba were not allowed to see or communicate with members of their family, some of whom have since passed away. Messrs. Kanyambo Rusagara and Byabagamba were also prevented on several occasions from meeting with their lawyers.

21. The source believes that the detention of Messrs. Kanyambo Rusagara, Byabagamba and Kabayiza constitutes arbitrary deprivation of liberty under categories II and III as defined in the working methods applicable to the consideration of cases submitted to the Working Group.

Arbitrary detention under category II

22. According to the source, Messrs. Kanyambo Rusagara's and Byabagamba's detention is arbitrary under category II because they were detained, prosecuted and convicted under impermissibly broad laws, solely for exercising their right to freedom of expression. This freedom is protected under article 19 of the International Covenant on Civil and Political Rights, article 19 of the Universal Declaration of Human Rights, article 9 of the African Charter on Human and Peoples' Rights and article 38 of the Rwandan Constitution.

23. The source maintains that the Kagame Administration uses intentionally vague laws in order to achieve its goal of repressing any person it perceives as a threat and that Messrs. Kanyambo Rusagara and Byabagamba were imprisoned in application of vague and intentionally broad laws. Certain provisions of the Rwandan Criminal Code, such as those punishing disrespect for the flag, are extremely broad and ambiguous, and criminalize the legitimate and protected exercise of freedom of expression. Moreover, the conviction of Messrs. Kanyambo Rusagara and Byabagamba was transparently motivated by a desire to repress dissent and fits squarely in the pattern of the Kagame Administration's human rights violations.

24. The source also notes that none of the generally accepted exceptions to the right to freedom of expression apply in this case. Indeed, neither the comments of Mr. Kanyambo Rusagara nor those of Mr. Byabagamba place national security, public order, public health or morals at risk, nor do they violate the rights or reputation of others. These men were convicted for expressing their views on the actions and policies of the Kagame Administrations in the context of private conversations held with individuals.

Arbitrary detention under category III

25. The source maintains that Messrs. Kanyambo Rusagara's and Byabagamba's deprivation of liberty is arbitrary under category III because of the grave violation of the international norms relating to the right to a fair trial.

26. According to the source, through the arbitrary arrest of Messrs. Kanyambo Rusagara and Byabagamba, the Government of Rwanda violated article 9 (1) of the Covenant, article 9 of the Universal Declaration of Human Rights, article 6 of the African Charter on Human and Peoples' Rights, principles 2 and 36 (2) of the Body of Principles for the Protection of Persons under Any Form of Detention or Imprisonment and article 51 of the Rwandan

Code of Criminal Procedure. Messrs. Kanyambo Rusagara and Byabagamba were not shown arrest warrants at the time of their detention. In Mr. Kanyambo Rusagara's case, an arrest warrant was only provided six days after his arrest.

27. According to the source, through the arbitrary searches of the homes of Messrs. Kanyambo Rusagara and Byabagamba, the Government of Rwanda violated article 17 of the International Covenant on Civil and Political Rights, article 12 of the Universal Declaration of Human Rights and articles 68 and 69 of the Rwandan Code of Criminal Procedure. The homes of Messrs. Kanyambo Rusagara and Byabagamba were searched without a search warrant and the men were not present during the searches, which were made after their arrests.

28. The source notes that, by denying Messrs. Kanyambo Rusagara, Byabagamba and Kabayiza prompt access to an unbiased judge to challenge the legality of their detention, the Government of Rwanda violated article 9 (3) and (4) of the International Covenant on Civil and Political Rights and principles 4, 11, 32 (1) and 37 of the Body of Principles. In fact, the men were not brought before the pretrial detention judge until 4 and 11 days after their arrest and the judge presiding over the bail hearing later appeared as a prosecution witness in the trial.

29. The source also notes that, by holding Messrs. Kanyambo Rusagara and Byabagamba in full-time solitary confinement at Kanombe prison from the time of their arrest until the present day, the Government of Rwanda has violated, and continues to violate, rules 43 (1) and 45 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

30. According to the source, by not releasing Messrs. Kanyambo Rusagara, Byabagamba and Kabayiza pending trial, and by failing to perform the required analysis of the specific circumstances of each of the detainees, the Government of Rwanda violated article 9 (3) of the Covenant and principles 38 and 39 of the Body of Principles.

31. The source states that by unjustifiably delaying their trial and violating Messrs. Kanyambo Rusagara's, Byabagamba's and Kabayiza's right to be tried without undue delay, Rwanda has violated article 14 (3) (d) of the Covenant and principle 38 of the Body of Principles.

32. According to the source, by repeatedly denying access to legal counsel and representation, the Government of Rwanda has violated, and continues to violate, article 14 (3) (b) and (d) of the Covenant, principle 18 (1) and (3) of the Body of Principles, article 7 of the African Charter on Human and Peoples' Rights, rule 119 of the Nelson Mandela Rules and article 29 (1) of the Rwandan Constitution. Messrs. Kanyambo Rusagara and Byabagamba were denied the right to communicate and meet with counsel on several occasions and are still routinely prevented from doing so. The source notes that no justification has been given for these denials.

33. The source further notes that the Government of Rwanda has violated Mr. Byabagamba's right to confidentiality with counsel, as guaranteed by article 14 (3) (b) of the Covenant, principle 18 (3) of the Body of Principles and rule 61 of the Nelson Mandela Rules. The source reports that, before the pretrial hearing, on the occasions when Mr. Byabagamba was allowed to meet with counsel, the meetings were always held in the presence of the prosecutor, without any justification.

34. Thus, according to the source, the Government of Rwanda has violated Messrs. Kanyambo Rusagara's and Byabagamba's right to be visited by family members, as guaranteed under principle 19 of the Body of Principles and rules 43, 58 and 106 of the Nelson Mandela Rules. From the time of their arrest until the present day, Messrs. Kanyambo Rusagara and Byabagamba have repeatedly been prevented from receiving visits from family members, in a random fashion and despite the fact that the attempts to visit took place during visiting hours. Because of these undue limitations, Messrs. Kanyambo Rusagara and Byabagamba were unable to meet and/or communicate with certain family members before they died.

35. According to the source, the Government of Rwanda has also violated Messrs. Kanyambo Rusagara's, Byabagamba's and Kabayiza's rights to a fair trial and to examine

the witnesses that testified against them, in violation of article 14, (1) and (3) (e) of the Covenant, article 10 of the Universal Declaration of Human Rights and article 7 (1) of the African Charter on Human and Peoples' Rights. Firstly, Messrs. Kanyambo Rusagara, Byabagamba and Kabayiza were not allowed to examine all the witnesses that testified against them. Secondly, one of the prosecution witnesses acknowledged after the trial that he was "forced" to testify against Messrs. Kanyambo Rusagara and Byabagamba. Thirdly, the Court convicted Messrs. Kanyambo Rusagara, Byabagamba and Kabayiza on the basis of the witness statement of a colonel who acknowledged that he had been forced to sign the statement without even reading it. Fourthly, the Court convicted Messrs. Kanyambo Rusagara, Byabagamba and Kabayiza on the basis of the witness statement of Mr. Kabayiza, who was tortured and forced to produce this testimony, and the statement of a colonel who served as a judge during the pretrial proceedings and was later called as a witness by the Government.

36. The source contends that by violently and repeatedly torturing Mr. Kabayiza, the Government of Rwanda has violated articles 7, 10 (1) and 14 (3) (g) of the Covenant, article 5 of the Universal Declaration of Human Rights, article 5 of the African Charter on Human and Peoples' Rights, principles 6 and 21 (2) of the Body of Principles, rules 1 and 43 of the Nelson Mandela Rules, articles 1 and 4 of the Code of Criminal Procedure of Rwanda, as well as article 14 of the Rwandan Constitution.

37. The source emphasizes that the Government of Rwanda has also violated Mr. Kanyambo Rusagara's right to be tried by a competent tribunal established by law, as guaranteed under article 14 (1) of the Covenant and article 23 of the Rwandan Constitution. Mr. Kanyambo Rusagara was forced to retire from the military in October 2013. As conceded by the Court, some of the offences of which he was accused were allegedly committed in 2014, when he was a civilian. In spite of this, he was tried and convicted by Kanombe Military High Court in March 2016. The source notes that there are no circumstances that might justify such a violation.

38. Lastly, the source maintains that the Government of Rwanda convicted Messrs. Kanyambo Rusagara and Byabagamba for a non-offence, thereby violating article 15 of the Covenant, article 11 of the Universal Declaration of Human Rights, article 7 of the African Charter on Human and Peoples' Rights and article 39 of the Rwandan Constitution. The provision of the Rwandan Criminal Code under which Messrs. Kanyambo Rusagara and Byabagamba were convicted refers to "statements made in meetings or public places, writings, printed materials, images or emblems of any form, posters sold or on sale or displayed to the public". This provision assumes that a statement is made in a meeting or a public place, which was not the case in the present instance, since the comments were made in private.

Response from the Government

39. On 11 September 2017, a communication relating to the allegations set out above was sent to the Government of Rwanda. In accordance with its methods of work, the Working Group gave the Government until 12 November 2017 to submit its response. The Committee notes that, as of the present date, the Government has not replied to this communication and has not requested an extension of the deadline.

Discussion

40. In the absence of a response from the Government, the Working Group has decided to render the present opinion in conformity with paragraph 15 of its methods of work.

41. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the source has submitted allegations which are free from inherent contradiction and substantiated by items of evidence provided by the source, as well as being consistent with information in the public domain. The allegations must therefore be considered priori credible. Accordingly, the Government's lack of

response implies that it has expressly chosen, against its interests, not to challenge the prima facie credible allegations.

42. As a preliminary point, the Working Group recalls its opinion No. 25/2012 concerning Rwanda, in which it found that journalists have been arbitrarily detained for having peacefully exercised their right to freedom of opinion and expression. Furthermore, the Human Rights Committee, in its concluding observations on the fourth periodic report of Rwanda, expressed concern at allegations of torture and ill-treatment being practised in detention centres as a means of eliciting confessions (see CCPR/C/RWA/CO/4 19, para. 19). The Committee also highlighted the vague nature of the definitions of certain offences, which makes them susceptible to abuse, and expressed concern about the chilling effect they may have on freedom of expression. It noted that opposition politicians, journalists and human rights defenders have been prosecuted on the basis of such vague charges in order to prevent them from expressing their opinions freely (ibid., para. 39).

43. Regarding the allegation of deprivation of liberty without legal basis, the Working Group notes that, according to the information provided by the source, Messrs. Kanyambo Rusagara and Byabagamba were arrested on 17 and 23 August 2014, respectively, without being informed of the reasons for their arrest and without being presented with an arrest warrant, in violation of article 9 of the Covenant.[1] This violation renders their arrest and subsequent detention arbitrary under category I.

44. The source also reports that Messrs. Kanyambo Rusagara and Byabagamba were arrested for having made comments deemed critical of the Kagame Administration in the course of private conversations. Their arrest and detention were based on intentionally vague and ambiguous Rwandan laws, which could thus be used to repress the legitimate and protected exercise of freedom of expression. Furthermore, the Human Rights Committee had already expressed concern about "laws on such matters as […], disrespect for flags and symbols, defamation of the Head of State and the protection of the honour of public officials".[2] The Working Group concurs with the Committee's view that States parties should not prohibit criticism of institutions such as the army or the administration and that imprisonment is never an appropriate penalty for such conduct.

45. The Working Group notes that article 19 (2) of the Covenant requires States parties to guarantee the right to freedom of expression, and that the Human Rights Committee has specified that limitations to freedom of expression cannot "be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights".[3]

46. Thus, the Working Group concludes that the charges on the basis of which Messrs. Kanyambo Rusagara and Byabagamba were arrested, detained and convicted stem directly from the peaceful and legitimate exercise of their freedom of opinion and expression, as guaranteed under article 19 of the Covenant, article 19 of the Universal Declaration of Human Rights and article 9 of the African Charter on Human and Peoples' Rights.

47. The source notes that none of the restrictions on the right to freedom of expression provided in article 19 (3) of the Covenant apply in this case. In this connection, the source refers to the three criteria applied by the Human Rights Committee: (a) the restrictions must be expressly provided by law; (b) they must serve one of the legitimate objectives provided for in article 19 (3); (c) they must be proportionate and necessary to the achievement of this objective.[4] The Working Group considers that in the absence of any justification in accordance with this provision, the arrest and detention of Messrs. Kanyambo Rusagara and Byabagamba are arbitrary under category II.

48. Regarding the alleged violation of the right to a fair trial, the Working Group notes that the Human Rights Committee has clarified that a reasonable delay for bringing an arrested person before a judge should be interpreted as not exceeding 48 hours, save in

[1] See opinion No. 34/2016, para. 38.
[2] General comment No. 34 (2011) on freedoms of opinion and expression, para. 23.
[3] Ibid., para. 23.
[4] Ibid., paras. 26–36.

exceptional circumstances,[5] and that, for persons pending trial, detention should be the exception and not the rule.[6] The Working Group also notes that the Committee has clarified that detainees have the right to meet and communicate with counsel in private, in conditions that respect the confidentiality of their conversations,[7] and also that the right to equality before the courts implies equality of arms as well as the absence of discrimination for the parties to the proceedings.[8]

49. In the present case, Messrs. Kanyambo Rusagara, Byabagamba and Kabayiza were tried by the Military High Court of Rwanda for ordinary offences. The Working Group recalls its established case law on the limits to the ratione materiae and ratione personae competence of military courts.[9] It notes that principle L of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa of the African Commission on Human and Peoples' Rights stipulates that "the only purpose of military courts shall be to determine offences of a purely military nature committed by military personnel" and that these two cumulative conditions are also reiterated in its opinions.[10]

50. The Working Group is particularly concerned about the torture and ill-treatment that Mr. Kabayiza is alleged to have suffered during certain interrogations. In accordance with its established practice, the Working Group will therefore refer the matter to the relevant Special Rapporteur for further consideration of the circumstances of the case and, if necessary, appropriate action. The Working Group recalls that torture is absolutely prohibited and that any instance of torture during pretrial detention constitutes a visceral risk for the trial that follows, making it impossible for such trial to be fair.

51. The Working Group therefore considers that the allegations of the source reveal a number of other violations of the right to a fair trial: specifically, the absence of arrest and search warrants (paras. 11, 12 and 27 above); full-time solitary confinement (paras. 14, 20 and 29 above); failure to bring the detainees before a judge without undue delay in order to give them the opportunity to challenge the legality of their detention (para. 28 above); violation of the right to liberty pending trial (para. 30 above); violation of the right to legal representation (para. 32 above) and the right to confidential communication with counsel (para. 33 above); violation of the right to be tried by a competent and impartial tribunal (paras. 15, 16 and 37 above); lack of cross-examination (paras. 18 and 35 above); and failure to guarantee equality of arms for the parties to the proceedings (paras. 18, 32, 33 and 35 above).

52. In these circumstances, the Working Group considers that the continued detention of Messrs. Kanyambo Rusagara, Byabagamba and Kabayiza violates articles 5, 9, 10 and 12 of the Universal Declaration of Human Rights; articles 7, 9, 10, 14, 15 and 17 of the Covenant; articles 6 and 7 of the African Charter on Human and Peoples' Rights; rules 1, 43, 45, 58, 61 and 119 of the Nelson Mandela Rules; and principles 2, 4, 6, 11, 18, 19, 21, 32 and 35 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Working Group finds that the violations are of such

[5] Human Rights Committee general comment No. 35 (2014) on liberty and security of person, para. 33. The Working Group has been very measured in its analysis and a direct citation is apposite in order to preserve all the nuances of the Human Rights Committee's interpretation: "While the exact meaning of "promptly" may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest. In the view of the Committee, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances. Longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of ill-treatment. Laws in most States parties fix precise time limits, sometimes shorter than 48 hours, and those limits should also not be exceeded. An especially strict standard of promptness, such as 24 hours, should apply in the case of juveniles."

[6] Ibid., para. 38.

[7] Human Rights Committee general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 22.

[8] Ibid., para. 8.

[9] See E/CN.4/2006/58; see also, inter alia, opinions No. 51/2016, No 44/2016 and No. 10/2014.

[10] See, for example, opinion No. 51/2016, para. 26.

gravity as to give the deprivation of liberty an arbitrary character in accordance with category III.

Disposition

53. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Franck Kanyambo Rusagara and Tom Byabagamba, being in contravention of articles 5, 9, 10, 12 and 19 of the Universal Declaration of Human Rights and of articles 7, 9, 10, 14, 15, 17 and 19 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and III.
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> The deprivation of liberty of François Kabayiza, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and of articles 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within category III.

54. The Working Group requests the Government of Rwanda to take the steps necessary to remedy the situation of Messrs. Kanyambo Rusagara, Byabagamba and Kabayiza without delay and to bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

55. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Messrs. Kanyambo Rusagara, Byabagamba and Kabayiza immediately and accord them an enforceable right to reparation, including compensation and a guarantee of non-repetition, in accordance with international law, and to provide them with medical care as needed and appropriate for their condition.

56. In accordance with paragraph 33 (a) of its methods of work, the Working Group has decided to refer the allegations of torture to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

Follow-up procedure

57. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including on:

(a) Whether Messrs. Kanyambo Rusagara, Byabagamba and Kabayiza have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Messrs. Kanyambo Rusagara, Byabagamba and Kabayiza;

(c) Whether an investigation has been conducted into the violation of Messrs. Kanyambo Rusagara's, Byabagamba's and Kabayiza's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Rwanda with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

58. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

59. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action

would enable the Working Group to inform the Human Rights Council of the progress made in implementing its recommendations, as well as of any failure to take action.

60. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[11]

[Adopted one 23 November 2017]

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[11] See Human Rights Council resolution 33/30, paras. 3 and 7.